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No. 78-1248

In the Supreme Court of the United States

OCTOBER TERM, 1978

GTE SYLVANIA, INCORPORATED, ET AL., PETITIONERS

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 590 F. 2d 1209. The original opinion of the court of appeals (Pet. App. A44-A59), which this Court vacated (see 434 U.S. 1030), is reported at 561 F. 2d 349. The opinion of the district court (Pet. App. A32-A42) is reported at 400 F. Supp. 848.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1978. The petition for a writ of certiorari was filed on February 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in directing the district court to adjudicate this case.

STATEMENT

In June 1974 Consumers Union and other parties ("the requesters") submitted to the Consumer Product Safety Commission a request under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), for disclosure of certain documents concerning television accidents. Petitioners, who manufacture televisions, had furnished these documents to the Commission under claims of confidentiality (Pet. App. A47). In March 1975 the Commission concluded that the documents are not exempt from disclosure under the FOIA and that, even if they were not subject to mandatory disclosure, the Commission would exercise its discretion in favor of disclosing them (*id.* at A48).

After receiving notice of the Commission's decision, petitioners filed suits in the United States District Court for the District of Delaware, and in certain other federal courts, seeking to enjoin disclosure (Pet. App. A48-A49). All of these suits were consolidated in the District of Delaware. The court issued a preliminary injunction in October 1975 prohibiting disclosure of the documents pending a decision on the merits (Pet. App. A71-A107).

The requesters did not seek to intervene in the Delaware proceeding. Instead, in May 1975 they filed an action against the Commission and the manufacturers in the United States District Court for the District of Columbia, seeking disclosure of the identical documents. The Commission and the manufacturers moved to dismiss on the ground that there was no case or controversy between the requesters and the Commission; in the alternative, the Commission and the manufacturers moved to stay further proceedings pending decision in the Delaware case (Pet. App. A51).

In September 1975 the district court in the District of Columbia dismissed the requesters' suit on the ground that, in view of the fact that both the requesters and the Commission favored disclosure of the documents, there was no case or controversy, and the court therefore lacked jurisdiction (Pet. App. A32-A42).

In July 1977 the United States Court of Appeals for the District of Columbia Circuit reversed (Pet. App. A44-A59). The court first held that there is a case or controversy between the requesters and the Commission with respect to whether the Delaware proceeding prevented the District of Columbia court from adjudicating the case and ordering disclosure, and that controversy sufficed to give the court jurisdiction (*id.* at A52-A53). Second, the court held that the Delaware proceeding did not prevent the District of Columbia court from proceeding to the merits because, the court of appeals believed, the Delaware proceeding had terminated; the court also found justification for its decision because it doubted the vigor and sincerity with which the Commission opposed the manufacturers' suit in Delaware (*id.* at A57-A58). The court therefore remanded to the district court with instruction to adjudicate the merits of the requesters' suit (*id.* at A58-A59).

The manufacturers filed a petition for a writ of certiorari. While the petition was pending, the Delaware court entered a final decision on the merits permanently enjoining the Commission from disclosing the documents (Pet. App. A118-A141).[1] In view of that action, this Court granted the manufacturers' petition, vacated the court of appeals' judgment, and remanded

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[1]The government has appealed the district court's permanent injunction to the Third Circuit. The case is *sub judice*.

the case to the court of appeals for further consideration in light of the injunction that had been issued by the Delaware court (Pet. App. A64).

On remand, the court of appeals ruled that the existence of a permanent injunction in Delaware did not alter its view that a Freedom of Information Act requester, not a party to the Delaware suit, is not barred from litigating its right to the documents in a second forum. The court reaffirmed its position that a case or controversy exists (Pet. App. A10) and ruled that the traditional anti-relitigation bars (stare decisis, collateral estoppel and comity) are inapplicable (*id.* at A11-A16). The court recognized that its holding might effectively nullify any judgment by another court in favor of a "reverse FOIA" plaintiff, but the court believed that this result could be avoided if the FOIA requester were joined as a defendant in the "reverse FOIA" lawsuit. The court also suggested that creation of a defendant class made up of all future requesters might solve the problems facing "reverse FOIA" plaintiffs (Pet. App. A17).

With respect to the government's concern that litigation of the case in two forums might subject it to inconsistent decrees, the court asserted that there were procedural devices that the government could have used to avoid that possibility. In particular, the court stated, the government could have moved to join the requesters under Fed. R. Civ. P. 19 (*id.* at A18-A20). The court of appeals thus ordered, for a second time, that the district court proceed with the case on its merits (*id.* at A23-A24).

ARGUMENT

For a second time, the court of appeals has instructed the district court to adjudicate the merits of the requesters' FOIA suit. For a second time,

circumstances bearing on the disposition of this case have changed while a petition for a writ of certiorari was pending. As a consequence, for a second time we urge the Court to deny review even though we substantially agree with petitioners' arguments on the merits.

The change of circumstances is that this Court now has held, in *Chrysler Corp.* v. *Brown*, No. 77-922 (April 18, 1979), slip op. 10, that "Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford [any person] any right to enjoin agency disclosure." "Reverse FOIA" actions thus are untenable. Disclosure of information by federal agencies may be inhibited only if some statute other than the FOIA forbids disclosure. Moreover, the Court held, agency regulations may be "authorization by law" within the meaning of the Trade Secrets Act, 18 U.S.C. 1905, and so permit disclosure notwithstanding that statute.[2] Although the manufacturers have argued that the Consumer Product Safety Act itself bars the disclosure sought here, the Third Circuit presumably will take *Chrysler* into account when it reviews the Delaware court's decision. The upshot of that review—whether or not the decision is affected by *Chrysler*—may be to dissolve the Delaware injunction, and thus to eliminate any possibility of inconsistent dispositions.

Petitioners' arguments are based in large measure on the possibility of inconsistent adjudications in Delaware and the District of Columbia, and petitioners'

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[2]The Consumer Product Safety Commission is authorized to disclose trade secrets and other information covered by 18 U.S.C. 1905 when the information in question is "relevant in any proceeding under this chapter." 15 U.S.C. 2055(a)(2). See also 15 U.S.C. 2055(b)(2)(B), 2074(c).

arguments about the existence of a "case or controversy" are colored by the Delaware order. If the Delaware order should be altered, this litigation would be in a fundamentally different posture. Because it is likely that the Third Circuit will dispose of the appeal from the Delaware injunction before this Court could adjudicate the arguments presented by petitioners, we believe that the prudential course is for this Court to deny the petition. A denial would simply return the case to the district court for additional proceedings. If those proceedings should lead to an order entered by the District of Columbia court that conflicts with the order entered by the Delaware court—if, indeed, the District of Columbia proceedings lead to any order at all—there would be time enough for review. Nonetheless, because petitioners have requested that the court of appeals' judgment be reversed summarily, we offer a short statement of our views on the merits of the issues presented by the petition.

First, we agree with petitioners' contention (Pet. 20-21) that the requesters have not stated a claim for which the FOIA grants a right to relief. The FOIA grants district courts "jurisdiction * * * to order the production of any agency records improperly withheld from the complainant" (5 U.S.C. 552(a)(4)(B)). The meaning of this phrase is a principal subject of the dispute in *Kissinger* v. *Reporters Committee for Freedom of the Press*, cert. granted, No. 78-1088 (April 16, 1979). But no one has argued in *Kissinger* that the withholding of a document pursuant to an injunction entered by a federal court of competent jurisdiction is "improper" within the meaning of the FOIA. Although petitioners and the Commission raised this point in the court of appeals, the court's opinion did not address it. We take this as an indication that the court disagreed with our submission. That was error. Obedience to the injunction was proper. Disobedience

would be contempt of court. Failure to violate a lawful judicial order simply cannot be "improper." Consequently, the complaint in this case should have been dismissed or summary judgment entered against the requesters.

Second, we agree with petitioners' contention (Pet. 28-30) that the court of appeals erred in instructing the district court to adjudicate, at once, a controversy that is the subject of adjudication in another federal court. It is established that a federal district court should refrain from duplicating or interfering with the proceedings and orders of another federal court with prior jurisdiction over the subject matter. See *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). Adjudication of the requesters' suit by the District of Columbia court would duplicate the efforts of the Delaware court.

There is no reason to depart from that general rule in this case.[3] In our view it makes no sense to require

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[3]The various procedural devices suggested by the court of appeals, including joinder of requesters under Fed. R. Civ. P. 19 in reverse FOIA cases and transfer or consolidation of cases filed in different courts, sometimes may be a feasible and appropriate means of avoiding potential conflicts in such cases. Indeed, in this case the Commission moved the Delaware court to transfer petitioner's suit to the District of Columbia for that very purpose, but the Delaware court denied the motion because of its prior jurisdiction and the extent of the litigation already completed in that court (Pet. App. A109-A117).

Contrary to the view of the court below, however, devices like Rule 19 are not always feasible or appropriate. Venue over the joined parties could be improper or particularly inconvenient in the forum in which the action was brought, and transfer of the action to the district in which the joined parties reside could be inconvenient to the parties who first brought the action (see 28 U.S.C. 1391(e) and 1404(a)). The court's further suggestion (Pet. App. A17) that petitioners could have maintained their suit in

the district court in the District of Columbia to adjudicate the same issues, involving the same materials, that have been adjudicated in Delaware and that are now pending in the Third Circuit. The only result of that effort will be that the courts in the District of Columbia either eventually will agree with the Delaware court or will subject the Commission to conflicting orders that may effectively compel this Court's review.[4] But even though the judgment here

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Delaware as a "defendant class action" against the Commission and "all those who likely may subsequently make such requests" or "all possible requesters" seems difficult to reconcile with the requirements of Fed. R. Civ. P. 23. Cf. *Indianapolis School Commissioners* v. *Jacobs*, 420 U.S. 128, 130 (1975). In short, the court's assumption that, with sufficient "creativity" (Pet. App. A18), some procedural device can always be found to accommodate the conflicting interests of different parties and to avoid the potential for conflicting judgments is unfounded, and it does not justify departure from the general and salutary rule that adjudication of a controversy should be conducted by the court first acquiring jurisdiction.

[4]Petitioners raise two additional arguments. Neither of them, in our view, warrants this Court's review at this time. First, petitioners argue (Pet. 16-20) that the requesters failed to make out an Article III "case or controversy." Although we originally advanced the same argument, on further reflection we have become persuaded (as we noted in our brief in opposition to petitioners' first petition for a writ of certiorari (Br. in Opp. 5)) that there are significant differences between the position of the Commission and the requesters with respect to the relief that can be provided in the face of a permanent injunction, and that such differences satisfy the "case or controversy" requirement.

Petitioners also contend (Pet. 21-25) that the requesters are collaterally estopped from litigating their Freedom of Information Act claim because they failed to intervene in the Delaware suit. In general, however, only the parties to a previous action are subject to estoppel. Any person is entitled to one full and fair opportunity for litigation. In rare cases, non-parties may be subject to estoppel. See, *e.g.*, *Montana* v. *United States*, No. 77-1134 (Feb. 22, 1979) (nonparty who assumes actual control over litigation in which it had a direct financial or proprietary interest held subject to collateral estoppel). That principle, however, does not control here. The requesters did not dictate the Commission's litigation strategy in the Delaware case. Moreover, the judgment in the Delaware case is not yet final, and so it would have no estoppel effect even with respect to the Commission. Petitioners rely on dictum in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 114 (1968), in which the Court suggested, without deciding, that a nonparty might "be bound by the previous decision because, although technically a nonparty, he had purposely by-passed an adequate opportunity to intervene" (Pet. 21-25). The court of appeals concluded (Pet. App. A22) that the requesters in this case "and perhaps information—requesters generally, should not suffer from bypasses of this sort." Whether that conclusion was legally correct, or whether the facts here would establish the kind of purposeful bypass necessary to subject a nonparty to collateral estoppel, are potentially significant questions. But we see no need for this Court to review that abstract proposition at this time, because it ultimately may have no effect on the outcome of this case.

will require the parties to engage in what we believe to be unnecessary and duplicative litigation, that burden will not be so great that this Court should grant review in advance of any appellate court decision on the merits. Should the Commission eventually find itself subject to inconsistent judgments and decrees from the two appellate courts, it may at that time seek this Court's review of both the procedural and substantive issues in the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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